

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 7, 2008 Session

STATE OF TENNESSEE v. JAMES RAE LEWTER

**Direct Appeal from the Circuit Court for Lincoln County
No. S0600095 Robert Crigler, Judge**

No. M2007-02723-CCA-R3-CD - Filed April 9, 2009

The Defendant-Appellant, James Rae Lewter (hereinafter “Lewter”), was convicted by a Lincoln County jury of burglary and theft of property valued at \$1,000 or more but less than \$10,000, both Class D felonies. The trial court sentenced Lewter as a Range II, multiple offender to eight years at thirty-five percent for each conviction to be served concurrently, for an effective eight year sentence in the Department of Correction. On appeal, Lewter argues: (1) the evidence was insufficient to convict him, (2) the trial court imposed an excessive sentence of eight years in violation of State v. Gomez, 239 S.W.3d 733, 740 (Tenn. 2007) (“Gomez II”), and (3) the State engaged in misconduct during closing arguments. Upon review, we reverse and vacate Lewter’s convictions for burglary and theft and dismiss the indictment.

**Tenn. R. App. P. 3 Appeal as Right; Judgments of the Circuit Court
Reversed and Vacated**

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

A. Jackson Dearing, III, Assistant Public Defender, Shelbyville, Tennessee (at trial) and S. Craig Moore, Fayetteville, Tennessee (on appeal), for the defendant-appellant, James Rae Lewter.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Ann L. Filer, Hollyn Hewgley, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

This case concerns the burglary and theft of a dentist’s office in Fayetteville, Tennessee, on January 31, 2006. During the burglary, computer equipment and furnishings were stolen.

On March 22, 2007, a jury convicted Lewter of burglary and theft of property valued at \$1,000 or more but less than \$10,000. On May 8, 2007, the trial court sentenced Lewter to an effective sentence of eight years. On May 14, 2007, Lewter filed a motion for a new trial. On September 17, 2007, Lewter filed an amended motion for a new trial. On October 31, 2007, the trial court denied these motions. On November 8, 2007, Lewter filed a timely notice of appeal.

Trial. Lewter challenges the sufficiency of the evidence supporting his convictions. A brief summary of the ten witnesses who testified at the March 22, 2007 trial is therefore necessary. Officer Scotty Vaughn, Det. Joel Massey, Dr. William Hamilton, Dinah Justice, and Special Agent Bradley Everett testified for the State. Anita Hill, Joanne Riddle, Off. Greg Crabtree, and Inv. Mickey Campbell testified for the defense. Lewter did not elect to testify.

Scotty Vaughn, a patrol officer with the Fayetteville Police Department, testified that he was dispatched to the scene of a burglary of a dentist's office in Fayetteville, Tennessee, on January 31, 2006. Upon arriving at the dental office at 7:45 a.m., he saw that a window on the east side of the building had been broken, leaving shattered glass inside and outside the building. Officer Vaughn entered the office and noticed glass on the inside of the window and on the floor. He said that "a white shirt was hanging over the railing close to the [broken] window," and the waiting room had magazines scattered on the floor. Dr. Hamilton, the owner of the office, told Off. Vaughn that the white shirt had not been there the previous day. Officer Vaughn began making a list of things missing from the office and contacted Det. Joel Massey and Det. Adam Eubanks, to process the evidence. Detectives Massey and Eubanks arrived at the dental office a short time later, and Off. Vaughn secured the crime scene. As Off. Vaughn examined the scene, he noticed that the office was in general disarray, papers had been scattered, and pictures had been taken from the hallway. Officer Vaughn completed his list of items that had been stolen. He did not observe a box with blood on it in the office and did not find gloves or anything else with blood on it. In addition, he did not see any blood around the broken window or window sill or on the shattered glass near the window.

Detective Joel Massey, a lieutenant with the Fayetteville Police Department, testified that he had been a detective for the last six years. He was en route to work on January 31, 2006, when he was notified about the burglary at Dr. Hamilton's office, and he went directly to the crime scene. Upon his arrival, he spoke with Off. Vaughn, assessed the scene from outside the building, and walked through the inside of the office. Detective Massey then contacted Det. Eubanks to assist with the investigation. Detective Massey first observed that the window on the east end of the building had been broken and there was shattered glass on the ground outside the window. The lower section of the window had been knocked out and the upper section had a whole in the glass. There were some small items from the inside of the office that were littered on the ground. below the broken window. He did not see any blood stains on the broken glass of the window or on the window sill or frame. He also found a latex glove, commonly used in dental offices, on the southeastern corner of the building. Detective Massey also noticed a window on the front of the building that looked as if it had been forced open. The front window had been damaged and could not be closed properly.

Detective Massey walked through the inside of the office and observed several objects that had been moved or thrown down. He was accompanied by Dr. Hamilton and his wife, who told him the things that had been moved or stolen. He noticed that the chairs in the waiting room were missing or were out of place and that a large table had been moved from the center of the room and pushed against the wall. He also saw the white shirt hanging on the railing and observed shattered glass and small items on the floor below the window at the east end of the office. He could see some small items had been thrown around in the receptionist's office, and he noticed that several pictures had been removed from the hallway. In the restroom at the east end of the building, someone had stuffed several boxes of latex gloves in the sink, and there were a couple of boxes of gloves in the hallway. Several drawers in a small work room and the examination room had been opened. The right-hand drawer of the receptionist's desk containing office supplies had been stolen. He also found a white towel with blood on it in a chair. A microwave oven had been taken from the Dr. Hamilton's personal office. One of the filing cabinets in the work room near the damaged front window had a drawer that was left open, which had been closed the previous day. Detective Massey also found a trash can that was loaded with unused office supplies.

He began gathering evidence, including the white shirt, the white towel, and some of the boxes containing the latex gloves that were in the bathroom sink. Detective Massey collected anything that looked like it had been moved for fingerprint evidence. He dusted drawers, doors, the top of the desk, the printer that was on the floor, and the glass under the window for fingerprints. He discovered fingerprints on a few things at the scene. He sent a few items that had not been dusted for fingerprints to the crime lab, along with the prints he had obtained. Although the crime lab found some identifiable prints on the submitted items, the lab was unable to find any matches for these prints in their database.

Detective Massey said that the white shirt that was sent to the crime lab had stains around the collar and on the armpits, so he requested a DNA profile on the shirt. He placed the white shirt and the towel in separate plastic bags, so that they would not be contaminated, and then took the bags back to the office, where they were sealed, labeled, put into evidence, and later taken to the crime lab for testing. He also packaged the boxes of gloves, two at a time, and sent them to the crime lab. The box of gloves that had blood on it was packaged separately and sent to the crime lab. He asked that the crime lab conduct DNA testing on the white shirt, the white towel with the blood stain, and the box of gloves with the blood stain. Based on the crime lab's test results for the towel, Det. Massey was asked to obtain a blood sample from Dinah Justice. He forwarded Justice's blood sample, and the crime lab determined that it matched the sample from the white towel. The blood on the box of latex gloves also belonged to Justice. Justice was later arrested and charged with the burglary and theft of Dr. Hamilton's office.

Based on the lab's test results for the white shirt, Det. Massey was asked to obtain a blood sample from Lewter. He forwarded Lewter's sample, and the crime lab determined that it matched the sample taken from the white shirt. The DNA profile showed that the shirt had been worn by Lewter, who was later arrested and charged in this case. Detective Massey identified the defendant,

Lewter, for the court. Detective Massey admitted that although some of the fingerprints were identifiable, none of the prints at the crime scene matched Lewter's prints.

Detective Massey's investigation revealed that Lewter and Justice had been in a sexual relationship, and Lewter had occasionally spent the night at Justice's apartment prior to the burglary of and theft from the dental office. This relationship was ongoing at the time of the burglary. He also discovered that Lewter and Justice had done some landscaping work together prior to the offenses. The State and defense counsel stipulated that there was a proper chain of custody of the evidence from the dental office to the crime lab and that the white shirt was admissible.

Dr. William McCown Hamilton testified that a burglary and theft occurred at his dental office on January 31, 2006. Dr. Hamilton said that he did not know Dinah Justice, but he knew Lewter because they went to high school together. He did not give Justice or Lewter permission to be in his office after regular business hours.

Dr. Hamilton said that he was the first person to discover the burglary and theft. The things stolen included furniture, rugs, pictures, antique game boards, computer equipment, and office supplies. He stated that one of the large rugs that was stolen would have been difficult to move. In addition, he said that it took two people to lift the large table that was moved fifteen feet. Dr. Hamilton acknowledged that the computer equipment and many of the furnishings that were stolen had depreciated in value because of their age. He received approximately \$5,000 from the insurance company for the things stolen from his office. He stated that he would never have sold the things that were stolen from him for less than \$1,000. Dr. Hamilton did not notice footprints underneath the broken window on the east side of the building, but he "could tell there had been a lot of activity there" because the weeds in the flower bed had been "trampled." He did not notice any tire prints near the broken window.

Dinah Lynn Justice testified that she knew Lewter had been charged with the burglary and theft of Dr. Hamilton's dental office. She admitted that she had already pled guilty to the crimes at Dr. Hamilton's office. She did not receive any promises from the State in exchange for her guilty plea. Although she had pleaded guilty at the time of her testimony, she said that her sentencing hearing was scheduled for April 4, 2007. When asked whether she hoped her testimony in Lewter's trial would help her sentence, she replied, "I said from the very beginning, my story has not changed, it is exactly what it was before. No – yeah, I hope I can get out of jail one day fairly soon. I would love that, but I am not anticipating it"

Justice explained how she became acquainted with Lewter:

We – I met him through Alcoholics Anonymous, sorry.

I would say working. We were doing a job together. We were both at the same place, at the same house, doing a job. I knew [Lewter] a little bit prior to that, but I never ran with him. Like I said, we were working partners.

She admitted that she was an alcoholic and that she suffered blackouts from her alcoholism. Justice stated that she “knew absolutely nothing about [the burglary and theft of Dr. Hamilton’s office] until [she] was approached by Det. Joel Massey in [the] Lincoln County Jail.” She explained that she “had no recollection whatsoever of [the break-in].” Detective Massey told Justice that her blood had been found at the dental office, and she pleaded guilty to the burglary and theft charges because she could not deny that she had been there.

Justice said that she had never had trouble with blackouts until her last few relapses with alcoholism. Although she had gone through a period of sobriety, Justice admitted that she was in the middle of a relapse of alcoholism on January 31, 2006. Justice acknowledged drinking with Lewter during this relapse:

Q. During this period of relapse did you – were you drinking with a lot of different people?

A. No.

Q. Were you drinking with a few different people?

A. No.

Q. Who were you drinking with?

A. I was drinking by myself[,] and I drank with James Lewter.

Justice described the time period surrounding the burglary and theft:

Q. Before the break-in, do you have some recollection of something that happened, anything that happened that day before the incident?

A. It was just about a week that [Lewter] and I were working out at [Dr.] Stacey Pace’s residence. Some days we were riding together, some days we were not. It was during that week.

I was drinking almost every evening with him. This went on about two weeks.

Regarding the early hours of January 31, 2006, she stated, “I have a memory of walking home around the corner there by the – by the river. This would have been between the business that was [burglarized] and my apartment” Justice’s apartment, which was in a house owned by Dr. Stacey Pace, and the dental office were approximately one-third of a mile apart. She remembered the following from January 31, 2006:

I remember just plain as day just walking around the corner and trying to decide whether I wanted to step on the [outside] of this metal thing that was along the road

or the inside [of it,] and if a policeman saw me, what I am doing there, what am I going to say. Thinking, well, should I take the river route, no, I am afraid down there. It is just so plain. That's it. That is the only memory I have.

Based on her memory, she did not have anything in her arms and did not remember carrying her purse the night of January 31, 2006. She recalled walking home by herself but did not remember where she had been. She also could not remember if she had been drinking with someone or drinking alone. She did not have a truck, although she said Lewter had a truck during this time because they used it to move rock and gravel together in January of 2006.

Justice said that she was 5 feet and 5 inches tall and weighed around 120 pounds. At the time of the burglary and theft, Justice acknowledged that she and Lewter had an ongoing relationship, although she spent most of their time together telling Lewter to leave her apartment and to stop calling her phone. She said that Lewter believed they had a serious relationship regardless of her efforts. Justice acknowledged that she and Lewter had been sexually involved, and he had spent the night at her apartment a few times. However, she stated that she never allowed him to leave clothes at her apartment. Justice said that she did not recognize the stained white shirt from the crime scene and denied ever borrowing or wearing the shirt.

Justice stated that she had a twenty-two-year-old son who moved to Huntsville in July of 2006. Her son owned a Ford Tahoe, but she said it was not really a truck because the "whole back end [was] completely taken [up] by this huge [sound system]." When asked whether her son currently possessed the computer from Dr. Hamilton's office, she stated, "My son had nothing to do with anything that I know of unless [he] and [Lewter] got together, and I don't believe that that happened." Justice said that her son never had possession of any clothes belonging to Lewter.

Justice described her reaction when she was served with the second subpoena to testify in Lewter's trial:

[Investigator Mickey Campbell] took me out of the cell and asked me to sign [the subpoena]. I would have to – [Lewter] was very upset about it. I had no clue what [Campbell] was talking about. Why would I care if [Lewter] was upset over something. I asked him[, "W]hy, why is [Lewter] upset[?"] He said because this was right after – this was sometime the beginning of January, he said[, "B]ecause [Lewter's] court date is not until March.["]

She added, "One thing I said, I don't know why they are asking – I have not made any statements against [Lewter] or for [Lewter]. Why are they asking me to come and testify now." She also told Campbell that she might not be in jail in March, and he said, "Oh, yes, you will be, and that was it." She denied making a statement in the presence of Investigator Campbell and Off. Crabtree that she had already told the police that Lewter was not involved in the burglary and theft.

Bradley Everett, a Special Agent Forensic Scientist with the Tennessee Bureau of Investigation, testified that he worked in the serology DNA unit.

The parties stipulated that Everett was an expert in the field of DNA analysis. Agent Everett said that he received a known blood sample from Lewter, and he performed DNA testing on that sample and obtained a DNA profile. He also tested the stained white shirt collected from the crime scene, which revealed skin cells capable of being tested. Agent Everett said that DNA from Lewter's blood sample matched the DNA from the skin cells found on the white shirt. The fact that the DNA from these two samples matched meant "that the DNA profile on the collar of this shirt came from James Lewter." Agent Everett said that assuming the white shirt was kept at room temperature and did not get moist, the skin cells would remain on the collar of the shirt for a period of years. He acknowledged that he could not determine the last time Lewter wore that shirt and admitted that Lewter could have worn the shirt for the last time several years ago. He also analyzed a blood stain on a box of latex gloves and a blood stain on a towel found at the scene and determined that the blood on these items belonged to Dinah Justice.

Anita Hill testified that she went to the home of her friend, Joanne Riddle, on January 30, 2006. She arrived at Riddle's home between 9:00 a.m. and 10:00 a.m. to make candles. Upon her arrival at Riddle's residence, she saw Lewter lying on the couch. Hill left Riddle's home between 10:00 p.m. and 11:05 p.m. on January 30, 2006. During this period of time, Hill did not ever leave Riddle's residence. She said Lewter left Riddle's house only one time while she was present:

Q. . . . Did [Lewter] ever leave to your knowledge?

A. The only thing he ever done [sic], he went outside in the yard picking up, straightening the yard up.

Q. Did you ever see him go outside of the yard?

A. No.

When Hill left Riddle's house at around 11:00 p.m., Lewter was asleep on the same couch. Hill stated that she worked for Jim Bonner, Lewter's father. She also said that she had known Lewter since the seventh grade.

Hill admitted that she told Det. Massey and an attorney for the State the day before trial that she could vouch for Lewter's presence at Riddle's home on January 30, 2006, because it was her stepdaughter's birthday. At trial, however, Hill stated that January 30, 2006, was actually her stepdaughter's child's birthday, rather than her stepdaughter's birthday, and she had gotten them confused.

Hill knew that Lewter and Justice were romantically involved, and Hill had met Justice one time. She was also aware that Lewter was doing work for Dr. Stacey Pace and that Dr. Pace had given Lewter a truck and money to pay the insurance for the truck. She remembered Dr. Pace's giving Lewter the truck in the middle or end of February because it was after the Super Bowl. Hill knew that Lewter would leave Riddle's house and spend the night at Justice's apartment.

Joanne Riddle testified that she had known Lewter for fifteen or sixteen years. Lewter was staying at her house on Monday, January 30, 2006, because he did not have anywhere else to live. Anita Hill came over to Riddle's house that day to make some candles. Riddle said that Lewter never left the night of January 30, 2006. When she went to sleep a little after 11:00 p.m., Lewter was asleep on the couch. Riddle was sure Lewter did not leave that night because she set her alarm system, and she was the only person who knew the alarm code. Riddle said that if Lewter got out of her house on the night of January 30, 2006, he "had to be some kind of Houdini." Riddle had seen Justice three or four times when she had picked up Lewter at her house. Every time Lewter would spend the night at Justice's apartment, he would pack a bag of clothes. Riddle admitted that she had told the State prior to trial that Dr. Pace had given Lewter the truck in January of 2006. However, at trial Riddle stated that she was unsure whether Lewter received the truck in January or February. She also admitted that she could not remember whether Lewter was at her house on January 30, 2006, until Hill reminded her that they were making candles that night. Riddle said that she had known Lewter's father, Jim Bonner, as a businessman in Huntsville before she knew Lewter. Riddle believed that she was Lewter's only friend.

Greg Crabtree, a corrections officer with the Lincoln County Sheriff's Department, testified that Mickey Campbell, an investigator with the public defender's office, came to his jail to serve a subpoena on Dinah Justice. He escorted Inv. Campbell to Justice's cell to serve the subpoena. Officer Crabtree testified at trial that when Justice was served with the subpoena, she said, "I done [sic] told them he wasn't there." At the conclusion of his testimony, the State indicated that Off. Crabtree had previously given a different story regarding Justice's statement at the time she was served with the subpoena:

Q. Greg, didn't you just tell me in the hall you thought she said, "I don't remember him being there," isn't that what you just told me right out here in the hall?

A. I didn't – anything is possible.

Q. What did you just tell me, Greg? Right out here in the hall, didn't you just say that she said –

A. She didn't remember him being there.

Q. Yeah. Isn't that what you told me she said?

A. Don't –

Q. So you don't know?

A. To be honest with you – 100 percent, no. Anything is possible.

Q. You told me in the hall she said[,] "I don't remember him being there[,] right?

A. It is possible that I said that, yes, sir.

Mickey Campbell, an investigator with the public defender's office, testified that he went to the Lincoln County Correctional Facility to serve a subpoena on Dinah Justice, and Off. Greg Crabtree escorted him to Justice's cell. When he served Justice with the subpoena, Inv. Campbell stated that Justice said, "I have already told them [Lewter] wasn't there." Investigator Campbell admitted that he did not remember Justice's words verbatim.

ANALYSIS

I. Sufficiency of the Evidence. Lewter argues that the evidence is insufficient to support his convictions. We agree.

Tennessee Rule of Appellate Procedure 13(e) states, "Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt; therefore, a defendant on appeal has the burden of showing that the evidence is insufficient to support the jury's verdict. State v. Thacker, 164 S.W.3d 208, 221 (Tenn. 2005) (citing State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982)). A defendant's challenge to the sufficiency of the evidence must be rejected if this court determines "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original) (citation omitted); see also State v. Scarborough, 201 S.W.3d 607, 624 (Tenn. 2006).

This court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from that evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978), superseded by statute on other grounds as stated in State v. Barone, 852 S.W.2d 216, 218 (Tenn. 1993). A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in the State's favor. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973)). Issues regarding the credibility of witnesses, the weight and value of the evidence, and all factual issues raised by the evidence are resolved by the jury as the trier of fact, and this court does not re-weigh or re-evaluate the evidence. Id. (citing Cabbage, 571 S.W.2d at 835). Additionally, this court may not substitute its inferences drawn from the circumstantial evidence for those drawn by the jury as the trier of fact. Carruthers, 35 S.W.3d at 557 (citing Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956)).

"The identity of the perpetrator is an essential element of any crime." State v. Robert Wayne Pryor, No. M2003-02981-CCA-R3-CD, 2005 WL 901140, at *3 (Tenn. Crim. App., at Nashville, Apr. 19, 2005) (citing State v. Thompson, 519 S.W.2d 789, 793 (Tenn. 1975)). The State has the burden of proving "the identity of the defendant as the perpetrator beyond a reasonable doubt." Id. (citing State v. Sneed, 908 S.W.2d 408, 410 (Tenn. Crim. App. 1995)). The State may prove the perpetrator's identity using only circumstantial evidence. State v. Rice, 184 S.W.3d 646, 662 (Tenn.

2006) (citing State v. Reid, 91 S.W.3d 247, 277 (Tenn. 2002)). However, where the defendant is convicted based on only circumstantial evidence, the evidence must be “so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone.” State v. Smith, 868 S.W.2d 561, 569 (Tenn. 1993) (quoting State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985)). This court has clearly identified the situations in which solely circumstantial evidence can be used to convict a defendant:

The law is firmly established in this State that to warrant a criminal conviction upon circumstantial evidence alone, the evidence must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude every other reasonable theory or hypothesis except that of guilt, and it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that he is the one who committed the crime.

Pruitt v. State, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970). The jury must determine the weight given to circumstantial evidence. Williams v. State, 520 S.W.2d 371, 374 (Tenn. Crim. App. 1974). However, “[a] verdict of a jury may not be based alone upon conjecture, guess, speculation or a mere possibility.” State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987) (quoting Sullivan v. State, 513 S.W.2d 152, 154 (Tenn. 1974)).

Tennessee Code Annotated section 39-14-402(a) (2006) defines the offense of burglary:

A person commits burglary who, without the effective consent of the property owner:

- (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
- (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
- (3) Enters a building and commits or attempts to commit a felony, theft or assault;
- or
- (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

In addition, pursuant to Tennessee Code Annotated section 39-14-103 (2006), “A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” Theft of property valued at \$1,000 or more but less than \$10,000 is a Class D felony. See T.C.A. § 39-14-105(3) (2006).

Here, the proof showed that a burglary and theft occurred at Dr. Hamilton’s office on January 31, 2006. The only evidence linking Lewter to these offenses was a white shirt, containing skin cells matching Lewter’s DNA, that was left at the scene of the crime. Special Agent Everett testified that the skin cells could remain on the shirt for several years. Unlike a fingerprint or a blood sample taken from the scene, the presence of the shirt with Lewter’s DNA does not prove that Lewter was present at the time of the burglary and theft. We note that Lewter made no incriminating

statements regarding these crimes. In addition, no witnesses, including Justice, who pleaded guilty to these offenses, placed him at the crime scene. Because there was no other evidence, direct or circumstantial, to make the presence of the shirt at the dental office incriminating, the State failed to provide sufficient evidence to support Lewter's convictions. Therefore, we reverse and vacate Lewter's convictions and dismiss the indictment. Given our disposition of this case, it is unnecessary to address Lewter's two remaining issues.

CONCLUSION

Upon review, we reverse and vacate Lewter's convictions and dismiss the indictment.

CAMILLE R. McMULLEN, JUDGE